



Approach to Enforcement

April 2018

Our Ref: PD20010 2827

1 Introduction

1.1 The Consumer Council is a non-departmental public body (NDPB) established through the General Consumer Council (NI) Order 1984. Our principal statutory duty is to promote and safeguard the interests of consumers in Northern Ireland (NI).

1.2 The Consumer Council has specific statutory duties in relation to energy, postal services, transport, and water and sewerage. These include considering consumer complaints and enquiries, carrying out research, and educating and informing consumers.

1.3 The Consumer Council believes that a clear and concise approach to enforcement will provide consumer protection and act as a significant deterrent to industry. As such we welcome this opportunity to respond to the Utility Regulator's (the Regulator) consultation on its Approach to Enforcement.

2 Consultation Questions

The clarity of the annexed documents

2.1 The annexed documents provide welcome guidance on how the Regulator's approach to enforcement will be applied, enabling transparency for all industry members and interested stakeholders. Its proposed policy approach is complemented by the policy for financial penalties and the inclusion of the flowchart demonstrates

a clear methodology and timelines, particularly relevant for “alternative resolution” windows.

2.2 The flowchart in Annex 2 is particularly descriptive and we would appreciate some additional clarity from the Regulator in the following areas;

- At the initial investigation, is there further information available elsewhere to explain what might constitute a “*minor case quick solution*” or how this is measured?; and
- The approach to enforcement explains the Regulator may serve an Information Notice. We note the flowchart details gathering further information at the initial enquiry stage. Is this the Information Notice? If not, at what stage in the flowchart would the Information Notice be served?

2.3 We welcome the transparency that the annexed documents provide which will help ensure a consistent, no surprises approach in how the Regulator conducts its enforcement procedures.

The aim of the revised enforcement procedure

2.4 The competitive Northern Ireland energy market is continuing to develop, however the incumbent electricity and natural gas suppliers still maintain the highest market share. The Consumer Council strongly advocates for consumers to be aware of the different suppliers available, and shop around to get the best deal to

meet their needs. We have an ongoing “Switch and Save” campaign that promotes this message across NI to consumers.

2.5 As such, it is essential that consumer confidence in the competitive energy market remains high. Any negative publicity that indicates a lack of integrity or professionalism from industry participants has the potential to damage consumer trust in the specific company, the industry and the positive switching message that we promote.

2.6 The aim of the Regulator’s enforcement work sets out to protect consumers and act as a deterrent for all regulated companies. We fully support these aims and expect that all companies acting in accordance with their respective licence conditions will support this approach from the Regulator.

The concept of alternative resolution and how it fits into the procedure

2.7 We acknowledge that the inclusion of an alternative resolution option within the procedure provides an opportunity for a company to swiftly rectify any concern that has been identified at an early stage, without any finding of contravention. The Consumer Council understands the benefits of including this provision, which is consistent with the process used by similar regulators including Ofgem.

2.8 In our view alternative resolution provides a welcome and transparent opportunity for a company to immediately acknowledge and address any issues that have been identified. However, we are clear in our position that any resolution must provide comprehensive assurances that the matter has been addressed. This includes consumers being adequately compensated and meaningful measures implemented to demonstrate a commitment to preventing future contraventions. Alternative resolution must not be used as a means to agree a deal that allows a company to avoid its responsibility to consumers.

2.9 The Consumer Council is a strong advocate for an open and transparent approach as a matter of principle. We believe it is important for delivering consumer confidence. We therefore fully support the Regulator's proposal to publish the company name, details of the issue investigated, and the alternative resolution agreed on its website.

The concept of settlement and how it fits into the procedure

2.10 The concept of settlement within the Regulator's enforcement procedure is in our view a common sense and best practice approach. We believe it is fair to allow a company an opportunity to reflect upon and admit a contravention, in a similar vein to the enforcement procedure adopted by Ofgem. The rationale is akin to a court of law, whereby an early admission of wrongdoing would often result in a lesser penalty.

2.11 It is important that the contravention committed by the company remains the key focus for the Regulator when any settlement is proposed. Whilst there are proposed financial incentives for the company to settle, this must not dilute the investigation or the objective to ensure appropriate deterrents and remedies are implemented. Furthermore, we welcome the transparency that public consultation on the penalty amount, even in instances of settlement, will provide.

2.12 The Regulator has outlined that following agreement to settle, its investigation team will prepare a final statement for the settlement committee, excluding any previous admissions previously made by the company. The Regulator believes this will enable the committee to form its own view on the penalty amount or whether an enforcement order may be required. The Consumer Council is unclear as to the rationale behind this proposal and we would welcome clarity on this issue.

2.13 In order for the settlement committee to make an appropriate and balanced decision, surely full transparency should be provided and it should be aware of all contraventions. We do not understand why an early settlement would result in the settlement committee making its decision based on a high level admission of guilt. Settlement is not a reward mechanism for the company, it is an incentive to be open at the outset and less resource intensive for the Regulator. Penalties for contravention should be decided based on

all the facts and the incentive for settlement should only be the discounts offered within the settlement windows, not based on a dilution of the evidence.

The proposed settlement windows and discounts

2.14 The Regulator has proposed two settlement windows with a scale of 40% for early settlement and 20% for later settlement. In our view the reduction figure of 40% for early settlement seems generous. We would be interested to learn the Regulator's evidence as to why the figure of 40% is proposed as we are aware that Ofgem uses a similar early settlement sliding scale of reduction.

2.15 It provides three settlement windows with a sliding scale of 30% for early declaration, 20% in the middle window and 10% for the late window. Therefore we believe that the figure of 30% is more representative of an early admission discount for a breach or contravention, and we would ask the Regulator to consider adopting Ofgem's sliding scale.

Our proposals with respect to publication

2.16 The Consumer Council strongly supports and very much welcomes the proposal to publish cases which will help to ensure the transparency of the Regulator's work. As previously outlined, Northern Ireland's competitive energy market is still developing and it is vital that consumer confidence is not damaged. We therefore hope that the threat of publishing cases will act as a significant

deterrent, as ultimately it poses localised reputational risk to companies.

3 Additional comments

3.1 The Consumer Council understands the Regulator's rationale in applying prioritisation principles to help guide the appropriate course of action. In setting out some potential principles, the Regulator under "*the significance of the case*" includes the consideration of the level of harm to consumers.

3.2 The Consumer Council would welcome clarity from the Regulator on how the level of harm will be quantified. For example, must it impact upon significant consumer numbers or will harm to individual or small groups be relevant?

3.3 Again, in paragraph 60 relating to proposed changes to its financial penalty policy, the Regulator proposes giving prominence to consumer detriment arising from a contravention. We would seek similar clarity from the Regulator as to how consumer detriment will be quantified.

4 Conclusion

4.1 The Consumer Council believes that a clear and concise approach to enforcement will act as a strong deterrent to industry and provide consumers with appropriate protection in the event of detriment from contravention.

- 4.2 We very much welcome the transparency proposed by the Regulator in publishing its investigations. We strongly advocate for transparency, where feasible, in all aspects of energy policy, especially when consumers are impacted. We are aware that other regulatory bodies adopt an approach of publishing investigations and case outcomes. In our view this proposal from the Regulator represents a best practice approach to enforcement.
- 4.3 We are supportive of incentives that encourage the company to be forthcoming in agreeing settlement. However the incentive to settle should not diminish the seriousness of the contravention and the aim of enforcement. We have highlighted our concerns that include the prepared statement for the settlement committee excluding admissions, the generous value of 40% as an early discount incentive and our preference to adopt Ofgem's sliding scale.
- 4.4 We look forward to working with the Regulator on its application of enforcement measures which we hope will act as a significant deterrent, and provide consumers with trust and confidence in Northern Ireland's energy markets.
- 4.5 If you would like further information or to discuss any issues in this paper, please contact Mark Crawford on 028 9025 1640 or mark.crawford@consumercouncil.org.uk.



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